SUPREME COURT, U. S.
JUL 26 1967
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No. 421

In the

Supreme Court of the United States

OCTOBER TERM, 1967

HONORABLE WILLIAM J. CAMPBELL, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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No.

HONORABLE WILLIAM J. CAMPBELL, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THE HONORABLE WILLIAM J. CAMPBELL, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, PETITIONER HEREIN (and respondent in the court below) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above cause on April 7, 1967 which adjudged that a writ of mandamus issue directing petitioner to transfer a certain cause based on the Federal Employer's Liability Act to the United States District Court for the Eastern District of Tennessee, Northern Division for trial.

OPINIONS BELOW

There was no written opinion in either the United States Court of Appeals for the Seventh Circuit or the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 7, 1967 and is reprinted in Appendix A hereto, page 1a. A timely petition for rehearing was denied on April 28, 1967 (R. 89). The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does the judgment of the Court of Appeals, based on a *de novo* determination of the Railroad's motion to transfer under 28 U.S.C. § 1404(a), conflict with *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245 (1964)?

2. Is the use of the extraordinary writ of mandamus a proper method to review a non-appealable order denying a § 1404(a) motion to transfer—an issue the Court expressly left undecided in *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 33 (1955) and *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 244 (1964)?

3. Assuming that mandamus writ may be used to review a § 1404(a) motion and that a reviewing court may make a *de novo* determination of that motion, did the Court of Appeals in this instance properly issue a writ to require petitioner to grant the Railroad's motion?

STATUTES INVOLVED

The statutes involved are:

(1) 76A Stat. 699, 28 U.S.C. §1404(a):

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

(2) 63 Stat. 102, 28 U.S.C. § 1651(a):

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in and of their respective jurisdictions and agreeable to the usages and principles of law".

(3) 53 Stat. 1404, 45 U.S.C. § 51 states in part:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

(4) 62 Stat. 989, 45 U.S.C. § 56:

> "Under this chapter an action may be brought in a district court of the United States, in the district * * * in which the defendant shall be doing business at the time of commencing such action."

A STATEMENT OF THE CASE

The Original F.E.L.A. Action

Ralph Underwood initiated an action in the United States District Court for the Northern District of Illinois, Eastern Division, against his employer, the Southern Railway Company, respondent herein (hereafter "the Railroad"), to recover damages under the Federal Employer's Liability Act (45 U.S.C. §§ 51 et seq.) for injuries suffered while in the employ of the Railroad. The case was assigned for trial to petitioner, the Chief Judge of the court (R. 6).

The Railroad's Motion To Transfer

The Railroad then moved pursuant to 76A Stat. 699, 28 U.S.C. § 1404(a), to transfer the cause to the Eastern District of Tennessee, Northern Division "for the convenience of the parties and the witnesses and in the interests of justice * * * (R. 9).

The Railroad attached various affidavits and materials to its motion wherein it asserted that Underwood's residence was in Knoxville, Tennessee, that he had been injured and treated there, that key witnesses resided there, that the Railroad would suffer undue burden to defend in a trial in Chicago, and that earlier state court actions filed by Underwood against the Railroad for the same claim in areas outside of Knoxville had been dismissed for *forum non conveniens* (R. 6-22).

In reply, Underwood asserted that the Railroad would suffer no unfairness if the case was tried in Chicago; that the few witnesses involved, especially since almost all of them were employed by the Railroad or closely associated with it, could easily and economically come to Chicago for the trial or give their depositions to be used at the trial. (R. 23-48)

Order Of Petitioner

After considering all of these materials as well as briefs filed by Underwood and the Railroad, petitioner denied the Railroad's motion on November 2, 1966 in an order (Appendix B hereto, p. 3a) which stated in part:

> "• • • in light of the criteria tests set forth in § 1404(a) (Title 28 U.S.C.A.)—i.e. convenience of the parties and witnesses and most importantly the interest of justice—the court finds that there has not been a sufficient showing that '. . . the balance is strongly in favor of the defendant . . .' so as to avoid plaintiff's choice of forum."

The Railroad's Petition For A Writ Of Mandamus

The Railroad then filed in the United States Court of Appeals for the Seventh Circuit a petition for a writ of mandamus (R. 1) in which it set forth all of the matters discussed above and prayed that the court issue a writ of mandamus directing petitioner to vacate his November 2, 1966 order which denied its § 1404(a) motion and ordering him to transfer the cause to the Eastern District of Tennessee, Northern Division for trial. The Railroad claimed that petitioner's denial of the § 1404(a) motion "was clearly erroneous and amounted to an abuse of discretion, • • •" (R. 4).

The Court of Appeals issued a rule on petitioner to show cause why the writ should not issue and petitioner then filed his answer (54, 79).

Judgment of Court of Appeals

On April 7, 1967 two judges of the Court of Appeals (Judges Swygert and Cummings) voted to grant the Railroad's petition for a writ of mandamus (Appendix A, p. 1a). Judge Knoch voted to deny the petition. There was no written opinion by any of the judges.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' JUDGMENT, BASED ON A DE NOVO DETERMINATION OF THE RAILROAD'S § 1404(a) MOTION, IS IN DIRECT CONFLICT WITH PLATT v. MINNESOTA MINING & MANUFACTURING CO., 376 U.S. 240, 245 (1964).

The sole ground urged by the Railroad in support of its mandamus petition was that petitioner was guilty of "an abuse of discretion" in denying its § 1404(a) motion (R. 4).

The Railroad did not and obviously could not argue that petitioner considered any improper criteria in denying its motion since petitioner's denial order stated that it was based on the "convenience of the parties and witnesses and most importantly the interest of justice * * *", appropriate criteria to be considered for resolution of a § 1404(a) motion.

Thus, the Railroad in support of its mandamus petition was required to urge upon the Court of Appeals the very same arguments it presented to petitioner in support of its original § 1404(a) motion—the convenience of the parties and witnesses, etc. In other words, the Railroad requested the Court of Appeals to make a *de novo* determination of its § 1404(a) motion.

As a consequence, while the two judges of the Court of Appeals who voted to issue the writ of mandamus wrote no opinion in support of their decision, it is apparent that by necessity they made a *de novo* determination of the Railroad's § 1404(a) motion.

This *de novo* determination exceeded the Court of Appeals' appellate jurisdiction in mandamus actions involv-

ing § 1404(a) motions and directly conflicts with the rule the Court enunciated in *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245 (1964).[1] There District Judge Platt has denied defendant's motion to transfer the case to another district. Defendant then petitioned the Court of Appeals for the Seventh Circuit to issue a writ of mandamus to reverse Judge Platt's order. The Court ruled that Judge Platt had considered improper criteria in denying the motion. Instead of remanding the cause for further consideration by Judge Platt, the court issued a mandamus writ directing him to transfer the case to another district.

This Court then unanimously vacated the Seventh Circuit's mandamus writ and directed that the cause be remanded to Judge Platt for reconsideration of the transfer motion in light of appropriate criteria only. In its opinion, the Court emphasized that a reviewing court's sole function in a case of this nature is to determine if the trial judge considered appropriate criteria in resolving the transfer motion. If the reviewing court finds that the trial judge has considered only appropriate criteria, the reviewing court's function ends. It should not then make a *de novo* determination of the motion (376 U.S. at 245):

> "The function of the Court of Appeals in this case was to determine the appropriate criteria and then leave their application to the trial judge on remand. Extraordinary writs are 'reserved for really extraordinary causes.' *Ex parte Fahey*, 332 U.S. 258, 260 (1947), and then only 'to confine an inferior court to

[1] While *Platt* involved analogous Rule 21(b) of the Federal Rules of Criminal Procedure, it is apparent that the pertinent remarks of the Court apply with equal weight to § 1404(a) motions. See *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F. 2d 439, 445-48 (2d Cir. 1966) (concurring opinion by Judge Friendly).

a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). Here, however, the Court of Appeals undertook a *de novo* examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should not have done since the writ cannot be used 'to actually control the decision of the trial court.' *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953)."

Mr. Justice Harlan in a concurring opinion restated this rule and said that the "outright reversal" of Judge Platt's order "cannot well be regarded as other than a *de novo* determination of the change of venue motion on the part of the Court of Appeals. Such a course inescapably contravenes accepted principles governing the exercise of appellate jurisdiction". (376 U.S. at 246)[2]

Petitioner respectfully submits that this direct conflict between the Seventh Circuit's judgment and the rule of this Court in the *Platt* case warrants that the instant petition for writ of certiorari be granted.

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[2] On remand Judge Platt again denied the transfer motion. The Court of Appeals in a second appeal (345 F. 2d 681) issued another writ directing Judge Platt to transfer the case. In dissent, Chief Judge Hastings urged that the court had in fact made a *de novo* determination in violation of the Supreme Court's admonition (345 F. 2d at 688). A petition for writ of certiorari was then filed on behalf of Judge Platt, seeking reversal for the reasons stated in Judge Hastings' dissent. However, Judge Platt died and the case became moot for this and other reasons. The Supreme Court granted the petition and summarily *vacated* the mandamus writ by agreement of the parties (382 U.S. 456). As a consequence, the Court did not review the validity of the second writ.

II.

THE NUMEROUS DECISIONAL CONFLICTS AMONG AND WITHIN THE CIRCUIT COURTS OF APPEALS REQUIRE THAT THE SUPREME COURT DETERMINE IF THE USE OF THE EXTRAORDINARY WRIT OF MANDAMUS IS A PROPER METHOD TO REVIEW § 1404(a) MOTIONS—AN ISSUE THE COURT EXPRESSLY LEFT UNDECIDED IN NORWOOD v. KIRKPATRICK, 349 U.S. 29, 33 (1955) AND PLATT v. MINNESOTA MINING & MANUFACTURING CO., 376 U.S. 240, 244 (1964.)

Since an order denying a Section 1404(a) motion is not final, it is not appealable. The use of mandamus procedure to circumvent this established principle has been the subject of increasing controversy among the Circuit Courts of Appeal since the enactment of § 1404(a) in 1948.

As early as 1952, Judge Goodrich in the leading case of *All States Freight, Inc.* v. *Modarelli,* 196 F. 2d 1010, 1012, (3rd Cir. 1952), refused to permit a mandamus writ to be used to obtain review of § 1404(a) orders where, as in the instant case, the order was based on appropriate criteria:

> "• • • the risk of a party being injured by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus."
>
> "We do not propose to grant such review where the judge in the district court has considered the interests stipulated in the statute and decided thereon."

The views of Judge Goodrich have been adopted by the First, Fourth and District of Columbia Circuits, and for

a substantial period of time, the Eight Circuit.[3] Other circuits, notably the Seventh and the Second, have permitted review of Section 1404(a) orders through mandamus procedure in certain instances.[4]

Ten years ago this conflict was described by Professor Charles Alan Wright as a "controversy which now rages as to the use of mandamus to review trial orders granting or denying a transfer * * *. The views of the circuits are utterly conflicting * * *" (Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 776).

The issue of the propriety of mandamus procedure to review Section 1404(a) orders was before the Court in the cases of *Norwood* v. *Kirkpatrick*, 349, U.S. 29, 33, *Van Dusen* v. *Barrack*, 376 U.S. 612, 615 (1964) (note 3), and *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 244 (1964). However, in each instance the Court left the question open for future resolution.

The controversy on this issue among the circuits has not diminished either in intensity or in frequency since the Court's decisions in *Norwood*, *Van Dusen* and *Platt*. On the contrary, the controversy has increased. The entire matter is reviewed at length in the majority and concurring opinions in the very recent decision of *A. Olinick & Sons* v. *Dempster*, 365 F. 2d 439 (2d Cir. 1966).

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[3] *In re Josephson*, 218 F. 2d 174 (1st Cir. 1954); *Clayton* v. *Warlick*, 232 F. 2d 699 (4th Cir. 1956); *Great Northern Ry.* v. *Hide*, 238 F. 2d 852 (8th Cir. 1956); *Loew's Inc.* v. *McGuire*, 205 F. 2d 719 (D.C. App. 1953).

[4] *Chicago, Rock Island & P.R. Co.* v. *Igoe*, 220 F. 2d 299 (7th Cir. 1955) and *A. Olinick & Sons* v. *Dempster*, 365 F. 2d 439 (2d Cir. 1966).

The controversy in fact has extended to various judges *within* the same circuit. For example, Judge Hastings,[5] Castle and apparently Knoch (who voted to deny the writ in the instant case) of the Seventh Circuit, believe that mandamus procedure should not be employed to review § 1404 (a) orders where the order is based on appropriate criteria. Judge Friendly in the Second Circuit acknowledged that his position on this issue differs from that of his brethren.[6]

Even among the circuits which permit review of § 1404 (a) orders by mandamus writ, there is a disparity of the standards to be applied.[7]

This controversy is not one which will decrease with the passage of time. The increasing number of cases which involve multiple parties in different parts of the country has caused more § 1404(a) motions to be filed.

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[5] See Chief Judge Hastings' dissent in both of the Seventh Circuit decisions in *Minnesota Mining & Manufacturing Co.* v. *Platt*, 314 F. 2d 369, 378 (7th Cir. 1963) and 345 F. 2d 681, 688-9, (7th Cir. 1965). In this latter decision, Chief Judge Hasting echoed the earlier warnings of the late Judge Finnegan in his lengthy dissent in *Chicago, Rock Island & P. R. Co.* v. *Igoe*, 220 F. 2d 299, 305 (7th Cir. 1955).

[6] See Judge Friendly's concurring opinion in *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F. 2d 439, 445 (2d Cir. 1966).

[7] For example, mandamus writ may be issued where there is "an abuse of discretion", "a clear abuse of discretion", where the trial court's action was "arbitrary" or "clearly erroneous" or where there exist "extraordinary circumstances". The decisions in which these views of certain circuits are reflected are cited in *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F. 2d 439, 445-6 (2d Cir. 1966). This same decision also notes another conflict in the circuits which has been created by certain litigants seeking review of § 1404(a) orders by way of interlocutory appeal under 72 Stat. 348, 28 U.S.C. § 1292(b). See 365 F. 2d at 442-3.

It is vital that the Court resolve this controversy and determine the propriety of mandamus procedure to review § 1404(a) orders in order that all federal judges, including petitioner, may have appropriate guidelines to follow in passing upon this important question.

It is respectfully submitted that for the reasons stated by Judge Goodrich in *All States Freight, Inc.* v. *Modarelli*, 196 F. 2d 1010, 1012 (3d Cir. 1952) (discussed above) the writ of mandamus should not have been issued in the instant case.

CONCLUSION

This case represents one of the very few occasions where a Court of Appeals in a Federal Employer's Liability Act action by mandamus writ has ordered a trial judge to transfer the action to another district.[8] The case raises important questions of policy involving § 1404(a) and F.E.L.A. actions.

For all of the reasons stated above, petitioner prays that his petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] Compare *Ex parte Gulf, Colo & S.F.R. Co.*, 308 F. 2d 803 (5th Cir. 1962) where the court in an F.E.L.A. action involving similar facts refused to grant a writ to vacate an order denying a § 1404(a) motion.

APPENDIX A

Order Of The United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

FRIDAY, APRIL 7, 1967.

Before

Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

SOUTHERN RAILWAY COMPANY, *Petitioner,* vs. HON. WILLIAM J. CAMPBELL, Chief Judge, United States District Court, etc., *Respondent.*	No. 15957 — Original Petition for Writ of Mandamus.

This matter comes before the Court on the petition of Southern Railway Company for a writ of mandamus directing respondent to vacate and set aside the order entered November 2, 1966, in the case entitled *Ralph E. Underwood, Plaintiff* v. *Southern Railway Company, Defendant,* No. 66-C-813, with memorandum in support of petition for writ of mandamus; answer to petition for mandamus, with brief in support of answer; and reply of petitioner to respondent's answer and brief.

On consideration whereof, It Is Hereby Ordered and adjudged by this Court that a writ of mandamus issue directing Honorable William J. Campbell, Chief Judge of the United States District Court for the Northern

District of Illinois, Eastern Division, to vacate and set aside the order entered November 2, 1966, in the case entitled *Ralph E. Underwood, Plaintiff* v. *Southern Railway Company, Defendant,* No. 66-C-813, denying petitioner's motion to transfer, and directing said respondent to enter an order transferring said cause for trial to the United States District Court for the Eastern District of Tennessee, Northern Division.

(Note: Judge Knoch voted to deny petition for writ of mandamus).

APPENDIX B

Order Of Petitioner

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

RALPH E. UNDERWOOD,
Plaintiff,
vs.
SOUTHERN RAILWAY COMPANY,
a corporation,
Defendant.
No. 66 C 813

ORDER

Upon consideration of the briefs and affidavits filed by the parties in light of the criteria tests set forth in §1404(a) (Title 28 U.S.C.A.)—i.e. convenience of the parties and witnesses and most importantly the interest of justice—the court finds that there has not been a sufficient showing that ". . . the balance is strongly in favor of the defendant . . ." so as to avoid plaintiff's choice of forum. *Gulf Oil Co.* v. *Gilbert,* 330 U.S. 501, 508.

Accordingly, defendant's §1404(a) motion requesting transfer of the instant complaint to the Eastern District of Tennessee, Northern Division, is *denied.*

/s/ WILLIAM J. CAMPBELL
Campbell Chief Judge

Dated: Nov. 2 1966

SUPREME COURT, U. S.

SEP 22 1967

JOHN F. DAVIS, CLERK

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Petitioner,

v.

SOUTHERN RAILWAY COMPANY, a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders entered by the District Court for the Northern District of Illinois, Eastern Division (Pet. p. 3a), and by the court below (Pet. pp. 1a-2a) were not accompanied by opinions.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was entered on April 7, 1967. A petition for rehearing was denied on April 27, 1967. The petition for writ of certiorari was filed on July 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

Did the Court below err in granting a writ of mandamus which vacated a denial of a motion for transfer of a personal injury case based on 28 U.S.C., Sec. 1404 (a), and ordered the district judge to transfer the case to the District Court in Tennessee, where the record indicates that the District Court, in denying the transfer, had relied upon unauthorized criteria, and where the residence of the plaintiff, the site of the accident, and the residence of all the witnesses, were in Tennessee?

STATEMENT

The petition in this case seeks review of the order of the court below granting a writ of mandamus which required petitioner to vacate and set aside his order denying respondent's motion to transfer the case entitled *Underwood* v. *Southern Railway Company* (No. 66-C-813, N. D. Ill., Eastern Division), and ordered petitioner to transfer that case to the United States District Court for the Eastern District of Tennessee, Northern Division. The various papers which formed the record before petitioner at the time he denied the Section 1404(a) motion made by respondent, disclose the following undisputed facts:

Ralph Underwood, a resident of Knoxville, Tennessee, suffered personal injuries in respondent's John Sevier Yards in that city in May 1963 while serving as a road conductor aboard one of respondent's trains. Immediately after the accident, Mr. Underwood was treated by Dr. V. H. Young of Knoxville, a private physician. Thereafter, he was cared for by Dr. Young on several occasions at Fort Sanders Presbyterian Hospital in Knoxville, where other physicians and staff members participated in his treatment.

Knoxville was and is the residence not only of Mr. Underwood and Dr. Young, but also of the engineer, fireman and brakeman on the train at the time of the accident, and of a signalman who was at the time in the caboose with Mr. Underwood. Nevertheless, Mr. Underwood first instituted suit against respondent in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, in July 1965. On motion of the respondent, the suit was dismissed on the basis of *forum non conveniens,* the state court noting that

> "the plaintiff is a resident of Tennessee and an employee of the defendant in Knoxville, Tennessee. The accident occurred in Knoxville, Tennessee. The witnesses made known to this Court are all in Knoxville, Tennessee.
>
> "The courts of Tennessee, both state and federal, are open to the plaintiff and the affidavits on file reflect that the plaintiff can obtain a fair and speedy trial in Knoxville, Tennessee." Pet. for Writ, Exh. "C".)

Following the dismissal of his Florida suit, Mr. Underwood instituted suit in April 1966 against respondent in the Circuit Court for the Twentieth Judi-

cial Circuit of Illinois, St. Clair County. That action was also dismissed on the ground of *forum non conveniens,* the court noting that the facts which had prompted the Florida court to dismiss were applicable to a suit brought in Illinois. (Pet. for Writ, Exh. "D").

Finally, in May 1966, Mr. Underwood made, as he put it, a "third attempt to find a fair and impartial tribunal" by instituting suit under the Federal Employers' Liability Act, 45 U.S.C. §§ 51 et seq., in the United States District Court in Chicago. (Pet. for Writ, Exh. 3, "Response of Plaintiff".) Respondent promptly filed a motion under Section 1404(a) of 28 U.S.C. to transfer the case to Knoxville. The supporting papers and affidavits, in addition to setting forth the facts stated above, averred that a jury trial could be had in six to eight months in the District Court in the Eastern District of Tennessee, Northern Division, and noted the expense and inconvenience that would flow from the necessity of transporting the five or more witnesses, including Dr. Young, from Knoxville to a Chicago trial, and the inadequacy of the alternative of being forced to rely before a jury on testimony taken by deposition.

In response, Mr. Underwood stated that a jury trial could be had in Illinois as quickly as in Tennessee, that one of the respondent's witnesses, the brakeman, had agreed to come to Chicago as a witness for the plaintiff, and that he intended to take the depositions of the others. In addition, Mr. Underwood disputed the probable amount of respondent's additional expenses for a Chicago trial, and offered to post a cash bond of $700 to cover the transportation and lodging expenses of respondent's witnesses. Affidavits attached

to Mr. Underwood's response showed that he had been examined, after institution of the suit, in Chicago, and that air travel time between Knoxville and Chicago is about two hours.

Finally, in a personal affidavit, Mr. Underwood stated that

> "It is my sincere belief that my right to a fair trial will be seriously infringed and prejudiced should my lawsuit be tried in the City of Knoxville, Tennessee."

Elaborating on this, the affidavit stated that Knoxville is a "railroad town", since respondent is one of the largest single industries in Knoxville, and that

> "in such an atmosphere as Knoxville, it is difficult, if not impossible, to find twelve jurors who can strike a balance between my rights as an injured railroad employee and the railroad which is so vital to the entire community." (Pet. for Writ, Exh. 3-a.)

In reply, respondent filed affidavits of the President and the former President of the Knoxville Bar Association, who vigorously denied that plaintiff could not receive a fair trial in the Knoxville courts.

On November 2, 1966, Judge Campbell, the petitioner, denied the motion to transfer, entering the following order (Pet. p. 3-a):

> "Upon consideration of the briefs and affidavits filed by the parties in light of the criteria tests set forth in § 1404(a) (Title 28 U.S.C.A.)—i.e. convenience of the parties and witnesses and most importantly the interest of justice—the court finds that there has not been a sufficient showing that '. . . the balance is strongly in favor of the

defendant . . .' so as to avoid plaintiff's choice of forum. *Gulf Oil Co.* v. *Gilbert,* 330 U.S. 501, 508."

The petition for writ of mandamus was filed in the court below on November 16, 1966. After memoranda and briefs had been filed, the court (one judge dissenting) vacated petitioner's order of November 2, 1966, and directed him to enter an order transferring the case to the United States District Court for the Eastern District of Tennessee (Pet. pp. 2a-2a).

REASONS FOR DENYING THE WRIT

The absence of opinions by the court below cannot obscure the one basic fact: that Mr. Underwood advanced no affirmative basis for denying the Section 1404(a) motion except his personal belief that respondent is such a "pervasive influence" in Knoxville, Tennessee, that justice in the Federal District Court is not available there. While his opposing papers attempt to show that the disadvantages, inconveniences and expenses of a trial in Chicago were somewhat less than as asserted by respondent, his own affidavit made clear the affirmative basis of his opposition.

Petitioner's order does not refer specifically to Mr. Underwood's claim that he cannot secure justice in the District Court in the Eastern District of Tennessee. Nonetheless, not only the nature of the record before him, as described above, but also the wording of his order, make it apparent that he considered this claim to be determinative. His order recites the consideration of the statutory grounds, but as to the first two—"the convenience of parties and witnesses"—there can be no dispute that trial in Chicago would cause substantial inconvenience. The order expressly empha-

sizes the third consideration: "most importantly, the interest of justice." On the record before petitioner this can only be interpreted as a reflection of Mr. Underwood's assertions.

The relative availability of justice in two Federal District Courts is an unauthorized and altogether improper standard for determining a Section 1404(a) motion. In *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, a finding by a district judge that "it would be more difficult to get a fair and impartial jury in the Minnesota District than in the Eastern District of Illinois" was deemed improper by the court below, was repudiated by the Government in its appeal to this Court, and was implicitly rejected by this Court. As Mr. Justice Harlan, concurring, put it, such a consideration "was wholly out of bounds." 376 U.S. at p. 246.

Moreover, the express reliance by petitioner on the statement by this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508, that a plaintiff's choice of forum must prevail in the absence of a showing that "the balance is strongly in favor of defendant," indicates a further misunderstanding of the proper standards applicable to Section 1404(a) motions. The *Gulf Oil* decision was handed down in 1946, two years before Congress by the enactment of Section 1404(a) changed the prior rule. *Ex parte Collett*, 337 U.S. 55, 61. The change in standard is made explicit by the Court in *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32:

> "As a consequence [of the revision of existing law by Section 1404(a)], we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser

> showing of inconvenience. This is not to say that . . . the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

In light of these considerations, particularly the obvious need to exclude consideration of the allegations in Mr. Underwood's personal affidavit, the order by the court below was entirely proper. Failure to transfer Mr. Underwood's case to Knoxville would have permitted exactly what Congress intended Section 1404(a) to prevent. As the Court stated in *Van Dusen* v. *Barrack*, 376 U.S. 612, 635:

> "In considering the Judicial Code, Congress was particularly aware of the need for provisions to mitigate abuses stemming from broad federal venue provisions. The venue provision of the Federal Employers' Liability Act was the subject of special concern."

In an accompanying footnote, the Court quoted the Revisor's Note to Section 1404(a) (Report of the House Committee on Revision of the Laws on H.R. 7124, 79th Cong., 2d Sess., p. A127), which states:

> "As an example of the need of such a provision [Section 1404(a)], see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S.Ct. 6, 314 U.S. 44, 86 L.Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio."

1. Section 1404(a) does not, as the petition asserts, preclude an appellate court from entering an obviously appropriate transfer order. See *Koehring Co.* v. *Hyde Construction Co.*, 382 U.S. 362, 364 (distinguishing the *Platt* case, upon which petitioner relies, presum-

ably on the ground that in the *Platt* case, which arose under Rule 21(b) of the Federal Rules of Criminal Procedure, the record disclosed facts which could have formed the basis for a proper denial of the motion); *Hoffman* v. *Blaski*, 363 U.S. 335 (affirming the Seventh Circuit order granting a writ of mandamus to compel transfer to another district).

2. Review of this case is not warranted by a conflict among the circuits as asserted in the petition. None of the Courts of Appeals takes the position that review of a Section 1404(a) order is never available prior to final judgment. On the contrary, the Courts of Appeals of all the circuits appear to agree that such review will be available where, as here, the action of the district court is based upon improper standards. See:

First Circuit: *In re Josephson*, 218 F.2d 174 (1954) (review by mandamus available in "really extraordinary situations").

Second Circuit: *A. Olinick & Sons* v. *Dempster Bros. Inc.*, 365 F.2d 439 (1966) (review by mandamus available to correct a "clear-cut abuse of discretion").

Third Circuit: *Paramount Pictures* v. *Rodney*, 186 F.2d 111 (1951), *cert. denied*, 340 U.S. 953 (review by mandamus available where district court denied Section 1404(a) motion on ground that action could not be brought in the other district). *Cf. Rapp* v. *Van Dusen*, 350 F.2d 806 (1965, *en banc*) (mandamus available to review district court's denial of a claim of bias).

Fourth Circuit: *General Tire & Rubber Co.* v. *Watkins*, 373 F.2d 361 (1967, *en banc*) (writ issued where district court was shown to have abused discretion).

Fifth Circuit: *Humble Oil & Refining Co.* v. *Bell Marine Service, Inc.*, 321 F.2d 53 (1963); *Ex Parte Chas. Pfizer Co.*, 225 F.2d 720 (1955) (review available to correct a "clear abuse of discretion"); *Atlantic Coast Line R. Co.* v. *Davis*, 185 F.2d 766 (1950) (writ of mandamus granted where grounds upon which district court rested its decision were "wholly insufficient to support the order and to bring it within the terms of Section 1404(a)." *Id.* at 769). (The Fifth Circuit has declined to decide whether an interlocutory appeal or petition for writ of mandamus is the proper method of seeking review. See 321 F.2d at 55 n.5.)

Sixth Circuit: *Goranson* v. *Kloeb*, 308 F.2d 655 (1962) (mandamus available to correct "clear abuse of discretion").

Seventh Circuit: *Chicago, R.I. & P. R. Co.* v. *Igoe*, 220 F.2d 299 (1955, *en banc*), *cert. denied*, 350 U.S. 822 (mandamus granted to compel transfer where denial was "so clearly erroneous that it amounted to an abuse of discretion," 220 F.2d at 305).

Eighth Circuit: *McGraw-Edison Co.* v. *Van Pelt*, 350 F.2d 361 (1965, *en banc*) (overruling *Great Northern Ry.* v. *Hyde*, 238 F.2d 852 (1956), and holding that review available where district court's denial was "arbitrary").

Ninth Circuit: *Gulf Research & Development Co.* v. *Harrison*, 185 F.2d 457 (1950), *aff'd* by an equally divided Court, 344 U.S. 861 (review by mandamus available in "extraordinary" circumstances).

Tenth Circuit: *Houston Fearless Corp.* v. *Teter*, 318 F.2d 822 (1963) (review by interlocutory appeal available where "abuse of discretion" shown).

District of Columbia Circuit: *Wiren* v. *Laws,* 194 F.2d 873 (1951) (review by mandamus available where "the grounds for transferring the cause are insufficient to support the order and to bring it within the terms of the statute. [footnote omitted.]" *Id.* at 874).

See generally, 1 Moore, Federal Practice ¶ 0.147 at 1966-75 (1960, Supp. 1966); 7A Moore, *supra,* JC 613-14 (1966).

The reason is well stated by the Court of Appeals for the District of Columbia Circuit in *Wiren* v. *Laws, supra,* at p. 874: "If we were to hold even unauthorized orders of transfer to lie beyond our control, the effect would be to deprive litigants of forums to which they are entitled."

3. Nor is review here warranted by the disagreement among the circuits on the more limited question as to the power to review a district court decision which is based upon proper standards but in which it is asserted that the district court has abused its discretion. In the first place, the present petition does not present that question; as already discussed above, improper standards formed the basis for his action. In the second place, the problem is being resolved by the Courts of Appeals themselves. As the Second Circuit Court of Appeals recently noted in *A. Olinick & Sons* v. *Dempster Bros., Inc.:*

> "The great majority of recent appellate decisions, including those of our court, indicate that the Courts of Appeals consider themselves possessed of the power to issue mandamus in extraordinary circumstances to correct the disposition of a transfer motion by the District Court, even where the District Court has purported to consider proper factors." 365 F.2d 439, 443 (1966).

This resolution of the initial doubts demonstrates the propriety of the Court's earlier reluctance to pass upon the issue,* and speaks for a continuation of that policy in the instant case.

CONCLUSION

Wherefore, the petition for certiorari should be denied.

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* See Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 244 (assuming, without deciding, that review by mandamus was appropriate); Van Dusen v. Barrack, 376 U.S. 612, 615 n. 3; Norwood v. Kirkpatrick, 349 U.S. 29, 33 (declining to pass upon propriety of issuance of mandamus and deciding on the merits); Hoffman v. Blaski, 363 U.S. 335 (affirming order which granted writ of mandamus to compel transfer): Chicago, R. I. & P. R. Co. v. Igoe, 220 F.2d 299 (7th Cir. 1955, *en banc*), *cert. denied*, 350 U.S. 822 (mandamus granted to compel transfer); Paramount Pictures v. Rodney, 186 F.2d 111 (3d Cir. 1951), *cert. denied*, 340 U.S. 953 (mandamus granted to vacate denial of transfer). Compare Koehring Co. v. Hyde Construction Co., 382 U.S. 362 (holding that appellate court's mandamus order is a permissible means to compel transfer).

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No. 421

In the
Supreme Court of the United States
OCTOBER TERM, 1967

HONORABLE WILLIAM J. CAMPBELL, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY, a corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I.

THE RAILROAD'S NEW, INCORRECT CLAIM THAT PETITIONER CONSIDERED AN IMPROPER STANDARD IN DENYING ITS § 1404(a) MOTION IS A CLEAR ADMISSION THAT THE COURT OF APPEALS' JUDGMENT CONFLICTS WITH PLATT V. MINNESOTA MINING & MFG. CO., 376 U.S. 240, 245 (1964).

For the first time in any court, the Railroad now contends that petitioner considered "an *unauthorized* and

altogether *improper* standard" in determining its §1404(a) motion—"the relative availability of justice in two Federal District Courts" (respondent's brief, p. 7) (emphasis added).

This contention is an obvious attempt to avoid the conflict between the Court of Appeals' judgment and this Court's rule in *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964) (see petition, pp. 7-9)—that is, assuming mandamus is appropriate in some circumstances, it can never be used to review *de novo* a §1404(a) order based on appropriate criteria. This new contention simply is not supported by the record.

As noted in the petition (p. 7) the Railroad, in requesting that the Court of Appeals issue a mandamus writ, did not and could not argue that petitioner considered improper or unauthorized criteria in denying its §1404(a) motion; rather, the *sole ground* urged by the Railroad was that petitioner was guilty of "an abuse of discretion" in denying its §1404(a) motions (R. 4) and that the location of witnesses, the parties, the site of the occurrence, etc. (R. 2-4) required that the cause be transferred to Tennessee.*

There is no evidence whatsoever in the record to justify the Railroad's belated argument that petitioner decided the §1404(a) motion on the basis of Mr. Underwood's contention that he could not obtain a fair trial in Knoxville. This was only one of several grounds Mr. Underwood

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* Thus, the petition for a writ of mandamus concluded (R. 4):

> "Petitioner claims * * * that the balance of convenience to the parties and the witnesses is so overwhelmingly in favor of granting Petitioner's Motion to Transfer * * *, that the denial thereof was clearly erroneous and amounted to an abuse of discretion * * *."

presented against the Railroad's motion (R. 23-33). It is obvious, as petitioner indicated in his denial order, that there were other legitimate grounds—the convenience of the parties, the convenience of witnesses, the interests of justice—which in the proper exercise of petitioner's discretion could and did justify the denial.

The Railroad's need to rely on the "improper standard" argument in effect reflects its admission that the issuance of a mandamus writ where the trial judge considered only "proper standards" would conflict with the decisions of other Courts of Appeals and with the *Platt* case.

Thus, the Railroad acknowledges that there exists "disagreement among the circuits *on the more limited question* as to the power to review a district court decision which is based upon proper standards but in which it is asserted that the district court has abused its discretion" (respondent's brief, p. 11) (emphasis added).

However, this conflict extends beyond the Circuits. It is between the Court of Appeals and the Supreme Court. The primary issue (and hardly a "more limited question" for purposes of the instant petition) urged on this petition is that the Court of Appeals' judgment conflicts with the *Platt* case where *this Court* expressly condemned *de novo* review of transfer motions by appellate tribunals.

The Railroad's treatment of the *Platt* case is unusual: At one point in its brief (p. 7), the Railroad cites the *Platt* case to support its contention that petitioner allegedly considered an improper standard in denying its motion, and then apparently seeks to distinguish *Platt* because it involved analagous Criminal Rule 21(b) (pp. 8-9). The truth is that *Platt* has always been considered appli-

cable to §1404(a) motions; the Railroad cited it as pertinent authority in the Court of Appeals and all other courts have so considered it. See *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F. 2d 439, 445 (2nd Cir. 1966).*

The Railroad's contention that this Court should not review this cause because "the problem is being resolved by the Court of Appeals themselves" (respondent's brief, p. 11) assumes the very issue in question: first of all, as Judge Friendly indicated in *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F. 2d 439, 445 (2d Cir. 1966), the problem is *not* being resolved; secondly, and most importantly, as Judge Friendly further indicated, cases like *Olinick* are resolving the issue *contrary* to the *Platt* rule—that is, they permit mandamus to be used to review §1404(a) orders although the trial judge considered appropriate criteria only.

It is respectfully submitted that the respondent's brief is no answer to the instant petition; rather, the Railroad's belated and incorrect claim that petitioner considered improper criteria constitutes a strong, additional reason why this petition should be granted.

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* *Koehring Co.* v. *Hyde Construction Co.*, 382 U.S. 362, 364 (1966) (respondent's brief, p. 8) did not distinguish *Platt* on any grounds pertinent to the instant petition, since it merely sustained "the right of the court of appeals itself to order a transfer under extraordinary circumstances where a district judge refused to comply with its mandate," *A. Olinick & Sons* v. *Dempster Bros., Inc.*, 365 F. 2d 439, 448 (2nd Cir. 1966) (footnote 5). In *Hoffman* v. *Blaski*, 363 U.S. 335, 340 (respondent's brief, p. 9), the Court noted that it was not called upon to decide the very issues raised by the instant petition: "Discretion of the district judge is not involved. Propriety of the remedy of mandamus is not assailed."

II.

THE COURT, PURSUANT TO ITS SUPERVISORY POWERS, SHOULD RULE WHETHER MANDAMUS IS AN APPROPRIATE METHOD TO REVIEW § 1404(a) MOTIONS, AND IF SO, UNDER WHAT CIRCUMSTANCES.

As noted in the petition (pp. 10-13), the Court has never decided whether the extraordinary writ of mandamus is a proper method to review § 1404(a) motions.

The significance of this issue was recognized by the Court on its own initiative in *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 244 (1964):

> "Nor has the Government challenged the use of the extraordinary writ of mandamus as an appropriate means to review the refusal to transfer. We shall, therefore, not consider these matters here, assuming without deciding, their validity for purposes of this case."

The Railroad's brief cites § 1404(a) cases from all circuits, purportedly to show that each circuit has used mandamus to review § 1404(a) orders (pp. 9-10). Some of these cases obviously conflict with the primary *Platt* holding—mandamus is *improper* where the trial judge considered proper criteria.

But the Railroad's case review further indicates that the circuits apply a wide variety of standards to determine when mandamus is "proper"—"really extraordinary situations"; "clear-cut abuse of discretion"; "a clear abuse of discretion"; where denial was "arbitrary", etc.

This wide range of different, vague standards is a very compelling reason for the Court, pursuant to its supervisory power over the Courts of Appeals, to deter-

mine if mandamus is an appropriate method to review § 1404(a) motions, and if so, under what circumstances.

III.

ASSUMING PETITIONER CONSIDERED AN IMPROPER STANDARD, THE COURT OF APPEALS SHOULD HAVE REMANDED THE § 1404(a) MOTION TO PETITIONER FOR RECONSIDERATION INSTEAD OF ISSUING A MANDAMUS WRIT.

Assuming for purposes of argument only that petitioner considered an improper standard as the Railroad contends, the Court of Appeals still had no power to issue a writ of mandamus based on its *de novo* consideration of the § 1404(a) motion.

Thus, in *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964), the Court held that the Court of Appeals correctly ruled that the trial judge in deciding a § 1404(a) motion should not have considered a party's alleged inability to obtain a fair trial in another federal district. The Court, however, stated that the Court of Appeals erroneously issued a mandamus writ directing that the case be transferred: "The District Court's use of an inappropriate factor did not empower the Court of Appeals to order the transfer" (376 U.S. at 244).

Rather, the Court of Appeals should have "vacate[d] the judgment of the District Court [which denied the § 1404(a) motion] and remand[ed] the case for reconsideration of the motion for transfer without reference to the ability of the United States to receive a fair and impartial trial in Minnesota." (376 U.S. at 246).

Similarly in the instant case, if the Court of Appeals felt petitioner considered an improper standard in denying the § 1404(a) motion, it should have vacated his denial order and remanded the case to him for reconsideration in light of proper standards only.

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